

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs August 26, 2009

STATE OF TENNESSEE v. KEVIN SPURLING

Appeal from the Criminal Court for Roane County
No. 13323 E. Eugene Eblen, Judge

No. E2008-02599-CCA-R3-CD - Filed February 8, 2010

The Defendant, Kevin Spurling, pled guilty to one count of statutory rape, a Class E felony and received an agreed sentence of two years, as a Range I, standard offender, with the manner of service left to the discretion of the trial court. Following a sentencing hearing, the trial court denied the Defendant's request for judicial diversion and imposed a sentence of split confinement with ninety days to serve in the county jail followed by probation. In this appeal as of right, the Defendant contends that the trial court erred in denying judicial diversion and, in the alternative, in requiring the service of ninety days in jail prior to probation. Because the trial court failed to make any specific findings on the record relative to its denial of judicial diversion, the judgment of the trial court is reversed and remanded for further proceedings consistent with this opinion.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is
Reversed; Case Remanded.**

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and CAMILLE R. MCMULLEN, J., joined.

Joe H. Walker, District Public Defender; and Walter B. Johnson, Assistant Public Defender, attorneys for appellant, Kevin Spurling.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; Russell Johnson, District Attorney General; and Bill Reedy, Assistant District Attorney General, attorneys for appellee, State of Tennessee.

OPINION

The record reflects that the Defendant was indicted for the February 6, 2006 statutory rape of his step-daughter, S.R.,¹ the second count of the indictment alleged incest related to the same incident. Pursuant to the plea agreement, the Defendant pled guilty on July 25, 2008 to statutory rape in exchange for a dismissal of the incest count.² The State further agreed that it would not seek a sentence in the Department of Correction and would agree to a sentence of split confinement not exceeding six months in the local jail followed by probation, with specific length of the jail term to be determined by the trial court. Additionally, the State agreed not to oppose the trial court's consideration of the Defendant's application for judicial diversion. See Tenn. Code Ann. § 40-35-313.

At the October 27, 2008, sentencing hearing, the victim's mother testified that she was upset by the dismissal of the incest count. She expressed her desire that the Defendant be sentenced to some term of imprisonment so that "justice would be served." She also expressed concern that the Defendant not be placed in an employment position ever again where another child could be victimized. She read her daughter's statement, which detailed the Defendant's process of "grooming" the victim by earning her trust as a father figure and basketball coach. The letter recounted the victim's continued depression and suicidal ideation that she attributed completely to the abuse inflicted by the Defendant. The victim's mother admitted that since this incident, the victim had made an allegation of sexual abuse against an uncle and had also had a child. She also testified that the victim is doing much better now that she is taking medication for depression.

The State argued against the grant of judicial diversion primarily due to the seriousness of the offense and the likelihood that judicial diversion with its related expungement of the charge could result in the Defendant returning to a coaching or teaching career and place other children in peril. The presentence report reflects that the Defendant is highly educated with an undergraduate degree in psychology and a graduate degree in rehabilitative counseling. The psychosexual evaluation report indicated concern with the Defendant's failure to express remorse for his actions. The report also noted that the Defendant blamed the victim for the sexual activity as evidenced by his reference to her willingness to participate and her adult-like appearance. The report also indicated that the Defendant blamed his failed marriage with the victim's mother on the mother's bipolar mental health issues without mention that the sexual abuse of the victim contributed to the

¹ It is the policy of this court to refer to minor victims of sexual abuse by their initials. The indictment reflects the victim's date of birth as June 24, 1990.

² The transcript of the guilty plea submission hearing is absent from the record on appeal.

dissolution of the marriage. According to the evaluation, the Defendant minimized his role in the sexual activity by claiming that he was lonely in his relationship with the victim's mother.

At the conclusion of the sentencing hearing, the trial court denied diversion and imposed a sentence of split confinement, simply stating:

By your agreement the sentence is two years. The court does not feel this is a proper case for diversion and feels it would be a split sentence type [of] case.

I'm going to require him to serve 90 days in the county jail and go on probation for the balance.

And the recommendation made by the evaluator to attend the sex offender treatment group and comply with all those rules that are mandated by the State of Tennessee Sex Offender Board.

On appeal, the Defendant argues that the trial court failed to make proper findings regarding its denial of judicial diversion, referring to the sentencing hearing in this case as "a complete failure to follow proper procedure." Alternatively, the Defendant argues that he should have been granted full probation. The State concedes that the trial court failed to make the requisite findings regarding judicial diversion and asks this court to remand the case for a sentencing hearing with instruction to make appropriate findings regarding judicial diversion.

ANALYSIS

Judicial Diversion

Pursuant to Tennessee Code Annotated section 40-35-313(a)(1)(B), a defendant is eligible for judicial diversion when convicted of a Class C, D or E felony and has not been previously convicted of a felony or a Class A misdemeanor.³ The decision to grant judicial diversion lies within the discretion of the trial court and will not be disturbed on appeal unless it is shown that the trial court abused its discretion. State v. Parker, 932 S.W.2d 945,

³ The parties acknowledge that the Defendant in this case is eligible for judicial diversion. However, the statutory rape statute has since been amended to include the offense of statutory rape by an authority figure and the law now precludes the consideration of judicial diversion for a Defendant who commits a similar offense today. See Tenn. Code Ann. §§ 39-13-532 and 40-35-313(a)(1)(B)(ii)(k).

958 (Tenn. Crim. App. 1996). A denial of judicial diversion will not be overturned if the record contains any substantial evidence to support the trial court's action. Id.

When making a determination regarding judicial diversion, the trial court must consider the following factors: (1) the defendant's amenability to correction, (2) the circumstances of the offense, (3) the defendant's criminal record, (4) the defendant's social history, (5) the defendant's mental and physical health and (6) the deterrent effect of the sentencing decision to both the defendant and other similarly situated defendants. State v. Lewis, 978 S.W.2d 558, 566 (Tenn. Crim. App. 1997). The decision should be based on whether the grant of diversion will serve the ends of justice for both the public and the defendant. Id. The record must reflect that the trial court considered and weighed all these factors in arriving at its decision. State v. Electroplating, Inc., 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998). Furthermore, "[t]he court must explain on the record why the defendant does not qualify under its analysis, and if the court has based its determination on only some of the factors, it must explain why these factors outweigh the others." Id. (citing State v. Bonestel, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993)).

The trial court in this case failed to make any findings or explanation regarding its denial of judicial diversion. Our courts have repeatedly stressed the need for a trial court to articulate clearly its reasons for denying judicial diversion. See State v. Lewis, 978 S.W.2d 558, 556-67 (Tenn. Crim. App. 1997); State v. Bonestel, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993). Under circumstances such as those presented in this case, the absolute absence of any findings precludes review by this court. Accordingly, we reverse the trial court's denial of judicial diversion and remand this case for a new sentencing hearing. On remand, the trial court is instructed to consider the aforementioned factors and make appropriate findings in support of its determination regarding judicial diversion.

Denial of Full Probation

The Defendant argues, in the alternative, that he should have received full probation rather than split confinement. The State does not address this issue on appeal. Because we have reversed and remanded this case due to the trial court's failure to make appropriate findings regarding judicial diversion, we need not address this argument in depth. However, we note that the trial court's ruling regarding manner of service of the sentence is equally lacking in any findings that provide a basis for its sentencing determination. See Tenn. Code Ann. § 40-35-210(e) ("Whenever the court imposes a sentence, it shall place on the record, either orally or in writing . . . the reasons for the sentence, in order to insure fair and consistent sentencing."). Accordingly, should the trial court again deny judicial diversion on remand, the trial court is instructed to make appropriate findings regarding its imposition of sentence.

CONCLUSION

In consideration of the foregoing and the record as a whole, the judgment of the trial court is reversed and the case is remanded for further proceedings consistent with this opinion.

D. KELLY THOMAS, JR., JUDGE